ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA-HQ-OAR-2003-0130]

RIN 2060-AH67

Protection of Stratospheric Ozone: Minor Amendments to the Regulations Implementing the Allowance System for Controlling HCFC Production, Import and Export

AGENCY: Environmental Protection Agency [EPA].

ACTION: Direct final rule.

SUMMARY:

EPA is taking direct final action to amend the current regulations governing the production and trade of certain ozone-depleting substances to address issues concerning the export of previously imported material, heels, the exemption allowance petition process for HCFC-141b for military and space vehicle applications, and the definition for "importer." We are making these minor adjustments to our regulations in response to requests from the regulated community, to ensure equitable treatment of stakeholders, and to reduce burden where the integrity of the requirements can still be sufficiently maintained.

DATES: This direct final rule is effective on [INSERT DATE 90 DAYS FROM PUBLICATION] without further notice unless EPA receives adverse comment by [INSERT 30 DAYS FROM PUBLICATION], or by [INSERT DATE 45 DAYS FROM PUBLICATION] if a hearing is requested. If we receive adverse comment we will publish a timely withdrawal in the

Federal Register informing the public that this rule, or an amendment paragraph or section of this rule, will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-HQ-OAR-2003-0130**, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: a-and-r-Docket@epa.gov
- Fax: 202-566-1741
- Mail: Docket #, Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mail code: 6102T, 1200 Pennsylvania Ave., NW. Washington, DC 20460.
- Hand Delivery: Docket #EPA-HQ-OAR-2003-0130, Air and Radiation Docket at EPA West, 1301 Constitution Avenue NW, Room B108, Mail Code 6102T, Washington, D.C. 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-HQ-OAR-2003-0130**. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA

will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm.

FOR FURTHER INFORMATION CONTACT: Cindy Axinn Newberg, EPA, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205J), 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460, (202) 343-9729, newberg.cindy@epa.gov.

SUPPLEMENTARY INFORMATION:

1) Under the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Protocol), as amended, the U.S. and other industrialized countries that are Parties to the Protocol have agreed to limit production and consumption of hydrochlorofluorocarbons (HCFCs) and to phase out consumption in a step-wise fashion over time, culminating in a complete phaseout in 2030. Title VI of the Clean Air Act Amendments of 1990 (CAAA) authorizes EPA to promulgate regulations to manage the consumption and production of HCFCs until the total phaseout in

2030. EPA promulgated final regulations establishing an allowance tracking system for HCFCs on January 21, 2003 (68 FR 2820). These regulations were amended on June 17, 2004 (69 FR 34024) to ensure U.S. compliance with the Montreal Protocol. This action amends aspects of the regulations that relate to exports of previously imported material, the import of HCFC heels, the HCFC-141b exemption allowance petition process, the definition of "importer," and other aspects of the regulations.

EPA is publishing this rule without prior proposal because we view this as a non-controversial action and anticipate no adverse comment. However, in the "Proposed Rules" section of this *Federal Register*, we are publishing a separate document that will serve as the proposal to amend the current regulations if we receive adverse comment. This direct final rule will be effective on [INSERT DATE 90 DAYS FROM DATE OF PUBLICATION] without further notice unless we receive adverse comment by [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION], or by [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION] if a hearing is requested. If we receive adverse comment, we will publish a timely withdrawal in the *Federal Register* informing the public that the rule, or particular provisions of the rule, will not take effect. We would address public comments in any subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

2) Abbreviations and Acronyms Used in This Document

Act –– Clean Air Act Amendments of 1990

Article 2 countries –- industrialized countries that are not parties operating under paragraph 1 of Article 5 of the Montreal Protocol

Article 5 countries -- developing countries that satisfy certain conditions laid out in paragraph 1 of Article 5 of the Montreal Protocol

CAAA – Clean Air Act Amendments of 1990

Cap – limitation in level of production or consumption

CFC – chlorofluorocarbon

CFR – Code of Federal Regulations

EPA – Environmental Protection Agency

FDA – Food and Drug Administration

FR – Federal Register

HCFC – hydrochlorofluorocarbon

NASA – National Aeronautics and Space Administration

NODA – Notice of Data Availability

NPRM – Notice of Proposed Rulemaking

ODP – ozone depletion potential

ODS – ozone-depleting substance

Party – States and regional economic integration organizations that have consented to be bound by the *Montreal Protocol on Substances that Deplete the Ozone Layer*

Protocol – *Montreal Protocol on Substances that Deplete the Ozone Layer*

SBREFA – Small Business Regulatory Enforcement Fairness Act

SNAP – Significant New Alternatives Policy

UNEP – United Nations Environment Programme

U.S. – United States

3) **Tips for Preparing Your Comments.**

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Table of Contents

I. Regulated Entities

These minor amendments to the HCFC allowance allocation system will affect the following categories:

Category	NAICS code	SIC code	Examples of regulated entities
Chlorofluorocarbon gas manufacturing	325120	2869	Chlorodifluoromethane manufacturers; Dichlorofluoroethane manufacturers; Chlorodifluoroethane manufacturers
Chlorofluorocarbon gas importers	325120	2869	Chlorodifluoromethane importers; Dichlorofluoroethane importers; Chlorodifluoroethane importers.
Chlorofluorocarbon gas exporters	325120	2869	Chlorodifluoromethane exporters; Dichlorofluoroethane exporters; Chlorodifluoroethane exporters
Polystyrene Foam Product Manufacturing	326140	3086	Plastics foam Products (Polystyrene Foam Products)
Urethane and Other Foam Product (Except Polystyrene) Manufacturing	326150	3086	Insulation and cushioning, foam plastics (except polystyrene) manufacturing

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware potentially could be regulated by this action. Other types of entities not listed in this table could also be affected. To determine whether your facility, company, business organization, or other entity is regulated by this action, you should carefully examine these regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the "FOR FURTHER INFORMATION CONTACT" section.

II. Background

In 1990, as part of a resolution on ozone-depleting substances, the Parties to the Protocol identified hydrochlorofluorocarbons (HCFCs) as transitional substitutes for chlorofluorocarbons

(CFCs) and other more destructive ozone-depleting substances (ODSs). In 1992, the Parties negotiated amendments to the Protocol (the "Copenhagen Amendments") that created a detailed phaseout schedule for HCFCs, with a cap on consumption for Article 2 (industrialized) countries like the U.S. The Protocol defines consumption as production plus imports minus exports. The consumption cap is derived from the formula of 2.8 percent of the Party's CFC consumption in 1989, plus the Party's consumption of HCFCs in 1989. Based on this formula, the consumption cap for the U.S. is 15,240 ODP-weighted metric tons, effective January 1, 1996.

In the Copenhagen Amendments, the Parties created a schedule with graduated reductions and the eventual phaseout of the consumption of HCFCs. The schedule calls for a 35 percent reduction of the cap on January 1, 2004, followed by a 65 percent reduction on January 1, 2010, a 90 percent reduction on January 1, 2015, a 99.5 percent reduction on January 1, 2020, and a total phaseout on January 1, 2030. As a signatory to the Copenhagen Amendments (the U.S. deposited its instrument of ratification on March 2, 1994), the U.S. must comply with this phaseout schedule under the Protocol.

In 1992, EPA received petitions from environmental groups and industry asking the Agency to implement the phaseout by eliminating the most ozone-depleting substances first. Based on the available data at the time, EPA believed that the U.S. could meet, and possibly exceed, the Protocol schedule through a chemical-by-chemical phaseout. In 1993, as authorized by Sections 605 and 606 of the CAAA, EPA established a regulatory phaseout schedule that links the phaseout of particular HCFCs to the phaseout steps under the Protocol (58 FR 65018, December 10, 1993; 58 FR 15014, March 18, 1993). For example, under that schedule, HCFC-141b production and import ceased on January 1, 2003, apart from a few minor exceptions.

In 1999, the Parties negotiated another amendment to the Protocol (the "Beijing Amendment"), where they agreed to a cap on HCFC production for industrialized countries, effective January 1, 2004. This cap was derived from the average of the Party's consumption cap (2.8 percent of the Party's CFC consumption in 1989, plus the Party's HCFC consumption in 1989) and the result of the same formula for production (2.8 percent of the Party's CFC production in 1989, plus the Party's HCFC production in 1989). This formula results in a U.S. production cap of 15,537 ODP-weighted metric tons. The U.S. ratified the Beijing Amendment on October 1, 2003.

To implement the Protocol, as amended by the Copenhagen and Beijing Amendments, EPA established an allowance system under Title VI of the CAAA to ensure that U.S. production and consumption of HCFCs would continue to stay under the production cap and conform to the consumption phaseout steps. This allowance system was published in the Federal Register on January 21, 2003 (68 FR 2820). The HCFC allowance system is part of EPA's program to phase out the production and consumption, and restrict the use, of HCFCs in accordance with section 605 of the CAAA. EPA has accelerated certain aspects of the schedule contained in section 605 as authorized under section 606 of the CAAA.

III. Direct Final Action

EPA is taking direct final action to promulgate various minor amendments to the existing regulations implementing the HCFC phaseout. The following sections discuss these changes individually and specifically.

A. Exports of previously imported HCFCs

In accordance with 40 CFR 82.20(a), producers of class II controlled substances can request a "refund" of consumption allowances by submitting documentation demonstrating the

export of controlled substances and complying with the recordkeeping and reporting requirements of §82.24. This provision, as it currently is promulgated, only explicitly addresses the "refund" of consumption allowances to producers of class II substances and does not address scenarios concerning importers of controlled substances choosing to request a similar refund. The current applicable provisions refer solely to class II controlled substances produced in the United States. EPA has received requests from importers seeking to export previously imported class II controlled substances and obtain refunds of consumption allowances in a manner similar to similar to companies that have produced class II substances. These importers are concerned that domestic manufacturers have inadvertently been given an unfair advantage over importers.

EPA does not believe there was any reason for limiting the refund of consumption allowances solely to companies that produce class II controlled substances in the United States. EPA notes that the current codified language does not prohibit the refund of consumption allowances to importers, but instead fails to address that particular scenario while addressing the scenario of domestically manufactured class II controlled substances. EPA has made a practice of considering importers' requests for refunds of consumption allowances consistently with requests from producers.[1] To reflect this practice of equal treatment, EPA is amending §82.20(a) to refer to class II controlled substances that are both produced in and imported into the United States. EPA is also amending §§82.20(a)(1)(x) and 82.20(a)(2)(i)(B) to refer to importers as well as producers.

B. Heels

As currently defined at §82.3, a *Heel* is:

[1] Docket EPA-OAR 2003-0130 contains letters issued by EPA.

> the amount of a controlled substance that remains in a container after it is discharged or off-loaded (that is no more than ten percent of the volume of the container) and that the person owning or operating the container certifies the residual amount will remain in the container and be included in a future shipment, or be recovered for transformation, destruction or a non-emissive purpose

As part of a larger discussion concerning heels in the January 21, 2003 final rule (68 FR 2843), EPA received and addressed comments concerning whether the definition of heels applies to small containers or only to bulk shipments in larger containers, including but not limited to, rail cars. The comments received during the public comment period were placed in public docket A-98-33 which has been incorporated into OAR-2003-0130. In the January 21, 2003 final rule, EPA clarified that the definition of heel did apply to small containers.

Based on a review of these comments and subsequent information brought to EPA's attention, EPA no longer believes it is necessary to require that owners or operators of small containers and cylinders comply with the recordkeeping and reporting provisions. However, EPA currently does not limit the applicability of either the definition of heels or the recordkeeping and reporting provisions at §82.24(f) to larger bulk shipments. Neither the definition of heels nor the recordkeeping and reporting requirements refers to the size or type of the containers. The recordkeeping and reporting requirements state that any person who brings into the U.S. a container with a heel must indicate on a bill of lading that the class II controlled substance is a heel. Further, the person is required to report quarterly the quantity in kilograms brought into the U.S. and certify that the quantity is truly a heel by certifying it is no more than 10 percent the total volume of the container. In addition, the person must certify that the heel will either remain in the container and be included in a future shipment, be recovered and

transformed, be recovered and destroyed, or be recovered for a non-emissive use. Any person who brings a container with a heel into the U.S. also must report on the final disposition of each shipment within 45 days of the end of the control period.

Since the promulgation of the January 21, 2003 final rule, EPA has received new and compelling information regarding the general business practices for handling heels and also information concerning which containers are generally considered to carry heels of sufficient size to necessitate recordkeeping and reporting. In particular, EPA received and reviewed information from multiple sources regarding whether the heel recordkeeping and reporting (§82.24(f)) should apply to all sizes and types of containers and whether annual reports would be sufficient. EPA specifically reviewed information regarding business practices for managing heels from rail cars, tank trucks, ISO tanks, 2,000-lb cylinders, and 125-lb cylinders. Based on the information that EPA has reviewed, it seems that generally smaller containers, including 2,000-lb cylinders and 125-lb cylinders, are presumed empty and then refilled. The assumptions and practices for smaller containers differ from those for larger containers, such as rail cars, which are routinely weighed, after which any residual controlled substance that is still within the rail car is accounted. After extensive consideration, EPA stated in a letter contained in the docket for this rulemaking that "EPA has decided to reduce the reporting burden by modifying the requirements for reporting of heels. These modifications will follow the normal rulemaking process . . . [and] will include a change in frequency of reporting and a limit in the types of containers subject to reporting"[2]. Therefore, consistent with previous communication, through this action, EPA is revising the recordkeeping and reporting burden by modifying the requirements for heels.

[2] Letter signed by Drusilla Hufford, Director, Global Programs Division, May 10, 2004.

EPA is limiting the type of containers affected by the requirements and therefore subject to the recordkeeping and reporting requirements for heels. EPA is amending §82.24(f) to state that any person who brings into the U.S. rail cars, tank trucks, and ISO tanks containing a class II controlled substance that is a heel as defined in §82.3, must comply with recordkeeping and reporting requirements at §82.24(f). EPA has determined that the recordkeeping and reporting requirements are unnecessary for smaller containers such as 2,000-lb and 125-lb cylinders because it would be impractical to recover heels from these smaller containers for emissive use. Such heels would be included in future shipments with or without a certification. For the same reason, it is unnecessary to require a report on the final disposition of such heels.

EPA is also changing the reporting frequency for heels that are subject to the recordkeeping and reporting requirements. Section 82.24(f)(2) currently requires quarterly reports of the quantity of heels brought into the U.S. and certification that the heels are truly heels, and that they will either remain in the container to be included in a future shipment, be recovered and transformed, be recovered and destroyed, or be recovered for a non-emissive use. In addition, under §82.24(f)(3), any person who brings a container with a heel into the U.S. must report on the final disposition of each shipment within 45 days of the end of the control period – thus on an annual basis. Since these regulations took effect EPA has received new and compelling information from several sources regarding the practical implementation of these requirements. After reviewing information with regard to the management of heels, EPA has concluded that decreasing the reporting frequency will lessen the burden to the regulated community while still maintaining the integrity of the allowance system. By changing the regulations to require a single annual report, EPA is eliminating the need for four separate quarterly reports followed by an annual report. Furthermore, EPA is establishing the same date

for the annual report requirements under paragraphs (f)(2) and (f)(3) to permit companies to file this information together, thus lessening the overall regulatory burden.

EPA is also amending the definition of *Heel* at §82.3, to now read that a *Heel* is:

> the amount of a controlled substance that remains in a container after it is discharged or off-loaded (that is no more than ten percent of the volume of the container)

EPA believes it is necessary to amend the definition to decouple the definition of a *Heel* from the recordkeeping and reporting requirements.

EPA is amending the requirements so that companies that will continue to be subject to the provisions will report the same information currently required under §82.24(f) and in particular, the information required under paragraphs (f)(2) and (f)(3) on an annual basis, within 30 days after the end of the control period, rather than reporting the information required under (f)(2) on a quarterly basis and information required under (f)(3) on an annual basis. EPA is modifying the date of submission of the annual report from 45 days after the end of the control period to 30 days after the end of the control period to be consistent with other annual reporting requirements required under §82.24. EPA believes a consistent requirement will ease the burden to those that must submit annual reports. EPA believes that the removal of the quarterly reporting requirements and the change to 30 days after the end of the control period will result in a net reduction of burden to the regulated entities that are required to submit annual reports for heels.

C. HCFC-141b Exemption Allowance Petition Process

The final rule published on January 21, 2003 (68 FR 2820) established the HCFC-141b exemption allowance petition process for all formulators[3] of HCFC-141b. The July 20, 2001 notice of proposed rulemaking (66 FR 38063) proposed a petition process solely for space vehicle[4] and defense applications requiring new production of HCFC-141b after 2003. In response to comments received from spray foam formulators, the final rule opened this process up to all formulators of HCFC-141b. At the time of the final rule, those spray foam formulators, citing technical constraints with alternatives to HCFC-141b, suggested that those constraints could impede their transition from HCFC-141b to non-ODS alternatives. Two commenters recommended that EPA allow any entity to petition the Agency for HCFC-141b allowances beyond January 1, 2003. EPA could then, on a case-by-case basis, evaluate the petitioner's assertions that no viable alternatives are available to meet the needs of that specific petitioner. As stated above, EPA agreed with those commenters and established a petition process for all formulators of HCFC-141b to provide relief to any entity that did not have access to HCFC-141b while it was developing alternatives. Since the petition process was established in 2003, the majority of the initial petitioners (spray foam formulators) achieved significant progress in their transition to alternatives. Most firms now market foam systems containing non-ODS alternatives. Acknowledging this progress, in a separate but related rulemaking EPA published a final rule on September 30, 2004, stating that under the Significant New Alternatives Policy (SNAP) program, HCFC-141b would be unacceptable for use as a foam blowing agent starting

[3]According to 40 CFR 82.3, a formulator is an entity that distributes a class II controlled substance or blends of a class II controlled substance to persons who use the controlled substance for a specific application identified in the formulator's petition for HCFC-141b exemption allowances.

[4] Section 82.3 defines a space vehicle as a "man-made device, either manned or unmanned, designed for operation beyond earth's atmosphere. This definition includes integral equipment such as models, mock-ups, prototypes, molds, jigs, tooling, hardware jackets, and test coupons. Also included is auxiliary equipment associated with tests, transport, and storage, which through contamination can compromise the space vehicle performance."

January 1, 2005, with some minor exceptions (69 FR 58269). EPA did not receive any petitions for HCFC-141b from spray foam formulators for the 2005 control period and does not expect to receive any in the future.

Since 2003, EPA has received and approved petitions for space vehicle and defense applications (the approval letters can be found in Air Docket A-98-33, IV-G-26-34). As in the comments on the July 20, 2001, NPRM, information in petitions from the National Aeronautics and Space Administration (NASA) and Department of Defense (DOD) contractors (including contractors for the U.S. Air Force and the U.S. Department of the Navy) suggests that specific foam applications will continue to require new production of HCFC-141b due to their highly specialized technical nature and the unavailability of qualified alternatives. Depending on the length and/or the technical requirements of the applications, those petitioners expect to require new production of HCFC-141b until at least 2009, if not until 2015, when use of class II controlled substances (which include HCFC-141b) will be largely prohibited in accordance with Section 605 of the Clean Air Act[5].

EPA is eliminating the requirement that space vehicle and defense entities with previously approved HCFC-141b exemptions submit an annual renewal petition for HCFC-141b exemption allowances as long as the needed amounts do not increase significantly. The Agency has sufficient information from the petitioners mentioned above whose requests were approved regarding the quantities of HCFC-141b required, the technical constraints associated with alternatives, and the scope of the projects/applications potentially employing HCFC-141b until

[5]Section 605(a) of the Clean Air Act states that "Effective January 1, 2015, it shall be unlawful for any person to introduce into interstate commerce or use any class II substance unless such substance–

(1) has been used, recovered, and recycled;

(2) is used and entirely consumed (except for trace quantities) in the production of other chemicals; or

(3) is used as a refrigerant in appliances manufactured prior to January 1, 2020."

2015 (see the documents cited above from A-98-33 as well as IV-D-12, IV-D-16 and IV-D-28). Because of this, it is reasonable to eliminate the requirement to submit annual petitions for space vehicle and defense applications under §82.16(h), while retaining the petition process for new petitioners who believe they meet the criteria for an exemption, and for those instances where an entity's space vehicle or defense needs will exceed that entity's previously approved amount by greater than ten percent. If the entity's needs exceed that threshold, then the entity must submit a new petition in accordance with the requirements at §82.16(h)(1). Given the relatively small quantities of HCFC-141b that have been approved on an annual basis under the exemption program, ten percent represents an extremely small fraction of the HCFC-141b baseline (less than 0.01 percent).

In order to effectively manage and address U.S. space vehicle and defense needs, the Agency requests that any users of HCFC-141b in those applications that have not previously petitioned for HCFC-141b exemption allowances but that plan to seek new production of HCFC-141b in 2007 and beyond under this provision notify EPA of their application, technical constraints, and required quantities of HCFC-141b. We further clarify that the entity's previously approved amount, for the purposes of determining an amount that is ten percent greater, refers solely to amounts for which the entity did submit a petition in accordance with §82.16(h)(1)-(4).

Furthermore, in order to ensure that the regulations continue to conform to section 603 of the Clean Air Act and to monitor U.S. compliance with the Montreal Protocol production and consumption caps, EPA will maintain the reporting and recordkeeping requirements as detailed in §82.24. These include the requirement in §82.24(g)(1) that entities allocated HCFC-141b exemption allowances report biannually the quantity of HCFC-141b that was received as well as

the requirements in §82.24(b)(1)(xi) and §82.24(c)(1)(xi) that producers and importers report for each quarter the quantity of HCFC-141b that was produced and/or imported for these exempted applications.

In 2005, EPA also received and approved a petition for HCFC-141b exemption allowances where the HCFC-141b was to be used for baseline comparison in a laboratory during product development for HCFC-141b foam for comparative analysis of all new alternative formulations. If EPA develops a separate proposal to address continued production of HCFC-141b for this type of laboratory and product development use, as part of that proposed rulemaking, EPA will request and consider comments concerning the potential need for ongoing exemption allowances for comparative analysis. Since this action pertains only to use of HCFC-141b for space vehicle and military applications, EPA will not consider comments on use of HCFC-141b for comparative analysis during product development to be within the scope of this direct final rule.

D. Definition of Importer

The current definition of "importer" at §82.3, as published in the Federal Register on August 4, 1998 (63 FR 41625), reads:

> Importer means the importer of record listed on U.S. Customs Service forms for imported controlled substances, used controlled substances or controlled products.

In the August 4, 1998 Federal Register notice, EPA stated that it was simplifying the definition of "importer" "for enforcement purposes" and that work with an inter-agency taskforce of other federal agencies to enforce against the illegal import of banned class I controlled substances was a factor in the decision to amend the definition. EPA was responding to members of the taskforce that had "discovered difficulties in working with the definition of importer listed in the

May 10, 1995 final rule (60 FR 24988) in building cases against illegal importers due to ambiguities about who ultimately is responsible." In an effort to eliminate ambiguity EPA promulgated the definition above amending the May 10, 1995, definition. However, as a practical matter, given the enforcement experience since the promulgation of the 1998 definition above, EPA believes it is better to return to the more encompassing previous definition, modified to indicate that the importer of record is, as stated in the 1998 definition, the person listed on U.S. Customs documentation. Therefore, through this action, EPA is promulgating a revised definition for "importer" that is based on the May 10, 1995, definition with clarifying language regarding what is meant by "importer of record." With this change, the "importer" of a controlled substance includes, but is not limited to, the "importer of record." The revised definition will read:

> any person who imports a controlled substance or a controlled product into the United States. ``Importer'' includes the person primarily liable for the payment of any duties on the merchandise or an authorized agent acting on his or her behalf. The term also includes, as appropriate:
>
> (1) The consignee;
>
> (2) The importer of record (listed on U.S. Customs Service forms for imported controlled substances, used controlled substances or controlled products);
>
> (3) The actual owner; or
>
> (4) The transferee, if the right to draw merchandise in a bonded warehouse has been transferred.

Returning to the May 10, 1995, definition with the additional text clarifying "importer of record" better defines the universe of those that could be considered to be the "importer" of controlled substances.

E. Minor Regulatory Corrections

1. Allowance Requirements for Class II Substances with Lower Ozone Depleting Potentials

The regulations published on January 21, 2003 (68 FR 2820) establish an allowance system for class II controlled substances. The regulations include mechanisms for distribution and tracking of allowances for HCFC-22, HCFC-142b, and HCFC-141b. EPA recognizes there are many other class II controlled substances that are subject to regulations promulgated under 40 CFR Part 82. However, at this time manufacturers, importers and exporters of these other class II controlled substances, including but not limited to HCFC-225ca and HCFC-252, are not required to hold allowances to produce, import, or export these substances. The reasons for this appear in the preamble to the January 21, 2003 rule (68 FR 2823). When EPA apportions baseline production and consumption allowances for these other class II controlled substances, EPA intends to also establish a process under which the Agency would approve petitions for import of used class II controlled substances, similar to the petition process that currently exists for those class II controlled substances for which baseline production and consumption allowances have been apportioned.

As currently written, the prohibitions on production and import at §82.15(a) and (b) do not specifically limit themselves to those class II controlled substances for which allowances have been distributed. While restricting trade in these other HCFCs was not the intent of the January 21, 2003, final rule, and the allowance requirements have not been interpreted by EPA to extend to these other class II substances, EPA is concerned that it is possible for such an

interpretation to be made. Therefore, through this action, EPA is amending the affected paragraphs in §82.15 to clarify that the prohibitions apply only to those class II controlled substances for which EPA has distributed production and consumption allowances.

2. Removal of Class II Controlled Substances from §82.13(f)(2)

Prior to the promulgation of the January 21, 2003 requirements for recordkeeping and reporting for class II substances at §82.24 (68 FR 2820), EPA regulations already contained a select number of requirements for class II recordkeeping and reporting at §82.13. As a result of the reorganization of the recordkeeping and reporting requirements that occurred in the January 21, 2003 rulemaking, §82.13 generally houses the recordkeeping and reporting requirements for class I substances while §82.24 houses the recordkeeping and reporting requirements for class II substances. The January 21, 2003 rulemaking moved most of the recordkeeping and reporting provisions pertaining to class II substances from §82.13 to §82.24, and established additional recordkeeping and reporting requirements specifically for the class II allowance system at §82.24. Through an oversight, however, §82.13(f)(2), which is a recordkeeping provision for producers, continued to refer to class II substances. The recordkeeping provisions at §82.24(b)(2) render the provisions concerning class II substances at §82.13(f)(2) duplicative. Therefore, this action removes class II substances from §82.13(f)(2).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a "significant" regulatory action as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This rule is not a "significant regulatory action" within the meaning of the Executive Order.

B. Paperwork Reduction Act

This action includes only minor changes in the information collection burden. While some minor additional requirements exist, EPA is relieving the industry of other burdens and streamlining requirements. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2060-0498 (EPA ICR No. 2014.02). A copy of the OMB approved Information Collection Request (ICR) may be obtained from The Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW, Washington, DC 20460 or by calling (202) 566-1672. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a

Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this direct final rule. For the purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business that is identified by the North American Industry Classification System (NAICS) Code in the Table below; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Category	NAICS Code	SIC Code	NAICS small business size standard (in number of employees or millions of dollars)
1. Chemical and Allied Products, NEC	424690	5169	100
2. Chlorofluorocarbon gas exporters	325120	2869	100

After considering the economic impacts of this direct final rule on small entities, EPA concluded that this action will not have a significant economic impact on a substantial number of small entities. This direct final rule will not impose any requirements on small entities. None of the entities affected by this rule are considered small as defined by the size standards listed above.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal government and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a written statement is required under section 202, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, unless the Agency explains why this alternative is not selected or the selection of this alternative is inconsistent with law.

Section 203 of the UMRA requires the Agency to establish a plan for obtaining input from and informing, educating, and advising any small governments that may be significantly or uniquely affected by the rule. Section 204 of the UMRA requires the Agency to develop a process to allow elected state, local, and tribal government officials to provide input in the development of any proposal containing a significant Federal intergovernmental mandate.

EPA has determined that this direct final rule does not contain a Federal mandate that may result in expenditures of $100 million or more by State, local and tribal governments, in the aggregate, or by the private sector, in any one year. Viewed as a whole, all of today's amendments do not create a Federal mandate resulting in costs of $100 million or more in any one year for State, local and tribal governments, in the aggregate, or for the private sector. Thus, today's direct final rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments; therefore, EPA is not required to develop a plan with regard to small governments under section 203. Finally, because this direct final rule does not contain a significant intergovernmental mandate, the Agency is not required to develop a process to obtain input from elected state, local, and tribal officials under section 204.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as

specified in Executive Order 13132. Today's action is expected to primarily affect producers, importers and exporters of HCFCs. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This rule does not have tribal implications, as specified in Executive Order 13175. Today's direct final rule does not significantly or uniquely affect the communities of Indian tribal governments. It does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Applicability of Executive Order 13045: Protection of Children from Environmental Health & Safety Risks

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

While this direct final rule is not subject to the Executive Order because it is not economically significant as defined in E.O 12866, we nonetheless have reason to believe that the

environmental health or safety risk addressed by the underlying regulations may have a disproportionate effect on children. Depletion of stratospheric ozone results in greater transmission of the sun's ultraviolet (UV) radiation to the earth's surface. The following studies describe the effects on children of excessive exposure to UV radiation: (1) Westerdahl J, Olsson H, Ingvar C. "At what age do sunburn episodes play a crucial role for the development of malignant melanoma," Eur J Cancer 1994: 30A: 1647-54; (2) Elwood JM Japson J. "Melanoma and sun exposure: an overview of published studies," Int J Cancer 1997; 73:198-203; (3) Armstrong BK, "Melanoma: childhood or lifelong sun exposure," In: Grobb JJ, Stern RS Mackie RM, Weinstock WA, eds. "Epidemiology, causes and prevention of skin diseases," 1st ed. London, England: Blackwell Science, 1997: 63-6; (4) Whieman D., Green A. "Melanoma and Sunburn," Cancer Causes Control, 1994: 5:564-72; (5) Heenan, PJ. "Does intermittent sun exposure cause basal cell carcinoma? A case control study in Western Australia," Int J Cancer 1995; 60: 489-94; (6) Gallagher, RP, Hill, GB, Bajdik, CD, et. Al. "Sunlight exposure, pigmentary factors, and risk of nonmelanocytic skin cancer I, Basal cell carcinoma." Arch Dermatol 1995; 131: 157-63; (7) Armstrong, DK. "How sun exposure causes skin cancer: an epidemiological perspective," Prevention of Skin Cancer. 2004. 89-116.

This direct final rule is making minor changes to the existing regulatory regime for the class II controlled substances. Theses minor changes are not expected to increase the impacts on children's health from stratospheric ozone depletion.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 Fed. Reg. 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. The National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104_113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after

it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective [INSERT DATE 90 DAYS FROM PUBLICATION].

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Reporting and recordkeeping requirements.

DATED:

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, 40 CFR part 82 is amended as follows:

PART 82 –PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671-7671q.

Subpart A-Production and Consumption Controls

2. Amend §82.3 by revising the definitions of “Heel” and “Importer” to read as follows:

§82.3 Definitions for class I and class II controlled substances.

* * * * *

Heel means the amount of a controlled substance that remains in a container after it is discharged or off-loaded (that is no more than ten percent of the volume of the container)

* * * * *

Importer means any person who imports a controlled substance or a controlled product into the United States. ``Importer" includes the person primarily liable for the payment of any duties on the merchandise or an authorized agent acting on his or her behalf. The term also includes, as appropriate:

(1) The consignee;

(2) The importer of record (listed on U.S. Customs Service forms for imported controlled substances, used controlled substances or controlled products);

(3) The actual owner; or

(4) The transferee, if the right to draw merchandise in a bonded warehouse has been transferred.

* * * * *

3. Amend §82.13 by revising paragraph (f)(2) introductory text to read as follows:

§82.13 Recordkeeping and reporting requirements for class I controlled substances.

* * * * *

(f) * * *

(2) Every producer of a class I controlled substance during a control period must maintain the following records:

* * * * *

4. Amend §82.15 by revising paragraphs (a)(1) and (b) to read as follows:

§82.15 Prohibitions for class II controlled substances.

(a) Production. (1) Effective January 21, 2003, no person may produce class II controlled substances for which EPA has apportioned baseline production and consumption allowances, in excess of the quantity of unexpended production allowances, unexpended Article 5 allowances, unexpended export production allowances, or conferred unexpended HCFC-141b exemption allowances held by that person for that substance under the authority of this subpart at that time in that control period, unless the substances are transformed or destroyed domestically or by a person of another Party, or unless they are produced using an exemption granted in paragraph (f) of this section. Every kilogram of excess production constitutes a separate violation of this subpart.

* * * * *

(b) Import. (1) Effective January 21, 2003, no person may import class II controlled substances(other than transhipments, heels or used class II controlled substances) for which EPA has apportioned baseline production and consumption allowances , in excess of the quantity of unexpended consumption allowances, or conferred unexpended HCFC-141b exemption

allowances held by that person under the authority of this subpart at that time in that control period, unless the substances are for use in a process resulting in their transformation or their destruction, or unless they are produced using an exemption granted in paragraph (f) of this section. Every kilogram of excess import constitutes a separate violation of this subpart.

(2) Effective January 21, 2003, no person may import, at any time in any control period, a used class II controlled substance for which EPA has apportioned baseline production and consumption allowances, without having submitted a petition to the Administrator and received a non-objection notice in accordance with §82.24(c)(3) and (4). A person issued a non-objection notice for the import of an individual shipment of used class II controlled substances may not transfer or confer the right to import, and may not import any more than the exact quantity (in kilograms) of the used class II controlled substance stated in the non-objection notice. Every kilogram of import of used class II controlled substance in excess of the quantity stated in the non-objection notice issued by the Administrator in accordance with §82.24(c)(3) and (4) constitutes a separate violation of this subpart.

* * * * *

5. Amend §82.16 by revising paragraph (h)(1) introductory text and by adding paragraphs (h)(7) and (h)(8) to read as follows:

§82.16 Phaseout schedule of class II controlled substances.

* * * * *

(h) * * *

(1) Effective January 21, 2003, a formulator of HCFC-141b, an agency, department, or instrumentality of the U.S., or a non-governmental space vehicle entity, may petition EPA for HCFC-141b exemption allowances for the production or import of HCFC-141b after the

phaseout date, in accordance with this section. Except as provided in paragraphs (h)(4) and (7) of this section, a petitioner must submit the following information to the Director of EPA's Office of Atmospheric Programs no later than April 21, 2003, for the 2003 control period; and, for any subsequent control period, no later than October 31st of the year preceding the control period for which the HCFC-141b exemption allowances are requested:

* * * * *

(7) A formulator for, or an agency, department, or instrumentality of the U.S., or a non-governmental space vehicle entity that has previously petitioned for and been granted HCFC-141b exemption allowances under paragraph (h)(1) through (4) of this section is granted, on January 1 of each control period beginning January 1, 2007, HCFC-141b exemption allowances equivalent to 10% more than the highest amount previously granted under paragraph (h)(1) through (4) of this section to that petitioner for space vehicle uses or defense applications.

(8) A formulator for, or an agency, department, or instrumentality of the U.S.; or a non-governmental space vehicle entity that has previously petitioned for and been granted HCFC-141b exemption allowances under paragraph (h)(1) through (4) of this section but now seeks to obtain allowances in addition to those granted under paragraph (h)(7) of this section must submit a new petition in accordance with (h)(1).

6. Amend §82.20 by revising paragraphs (a) introductory text, (a)(1)(x), and (a)(2)(i)(B) to read as follows:

§82.20 Availability of consumption allowances in addition to baseline consumption allowances for class II controlled substances.

(a) A person may obtain at any time during the control period, in accordance with the provisions of this section, consumption allowances equivalent to the quantity of class II controlled substances that the person exported from the U.S. and its territories to a foreign state, in accordance with this section, when that quantity of class II controlled substance was produced in the U.S. or imported into the U.S. with expended consumption allowances.

(1) * * *

(x) A written statement from the producer that the class II controlled substances were produced with expended allowances or a written statement from the importer that the class II controlled substances were imported with expended allowances.

(2) * * *

(i) * * *

(B) The consumption allowances will be granted to the person the exporter indicates, whether it is the producer, the importer, or the exporter.

* * * * *

7. Amend §82.24 as follows:

a. Revise paragraphs (c)(1)(vi), (c)(2)(ii), (c)(3) introductory text.

b. Revise paragraphs (f) introductory text, (f)(1) introductory text, (f)(2) introductory text, and (f)(3).

§82.24 Recordkeeping and reporting requirements for class II controlled substances.

* * * * *

(c) * * *

(1) * * *

(vi) For substances for which EPA has apportioned baseline production and consumption allowances, the importer's total sum of expended and unexpended consumption allowances by chemical as of the end of that quarter;

* * * * *

(2) * * *

(ii) The quantity (in kilograms) of those class II controlled substances imported that are used and the information provided with the petition where a petition is required under paragraph (c)(3) of this section;

* * * * *

(3) *Petition to import used class II controlled substances and transhipment-Importers.* For each individual shipment over 5 pounds of a used class II controlled substance as defined in §82.3 for which EPA has apportioned baseline production and consumption allowances, an importer must submit directly to the Administrator, at least 40 working days before the shipment is to leave the foreign port of export, the following information in a petition:

* * * * *

(f) *Heels-Recordkeeping and reporting.* Any person who brings into the U.S. a rail car, tank truck, or ISO tank containing a heel, as defined in §82.3, of class II controlled substances, must take the following actions:

(1) Indicate on the bill of lading or invoice that the class II controlled substance in the container is a heel.

(2) Report within 30 days of the end of the control period the quantity (in kilograms) brought into the U.S. and certify:

* * * * *

(3) Report on the final disposition of each shipment within 30 days of the end of the control period.

* * * * *